Office-Supreme Court, U.S.
FILED
APR 23 1963

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 1041

GENERAL ELECTRIC COMPANY, ET AL.,

Petitioners,

PUBLIC SERVICE COMPANY OF NEW MEXICO, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Counsel for Petitioners

John E. Shattuck,
Lowry Building,
Denver 2, Colorado,
Joslyn Manufacturing and Supply Company; Southern States Equipment Corporation.

Winston S. Howard,
1900 First National Bank Building,
Denver 2, Colorado,
Allis-Chalmers Manufacturing Company; H. K. Porter Company, Inc.

For additional list of counsel, see inside front cover.

James T. Pallanis,
1220 Simms Building,
Albuquerque, New Mexico.
Carrier Corporation; Joslyn Manufacturing and Supply Company; Moloney Electric Company; Sangamo Electric Company; Southern States Equipment Corporation; Porcelain Insulator Company; Wagner Electric Corporation.

William A. Sloan,
Waldo Spiess,
First National Bank Building East,
Albuquerque, New Mexico.
Allen-Bradley Company; C H. Wheeler Manufacturing Company; Clark Controller Company; Cutler-Hammer Inc.; Ohio Brass Company, Inc.; Square D Company.

Benjamin F. Shapleton,
1700 Broadway,
Denver 2, Colorado.
Federal Pacific Electric Company.

Luis D. Rovirb,
931 14th Street,
Denver 2, Colorado.
Foster-Wheeler Corporation, Worthington Corporation.

William A. Sloan,
Charles C. Spann,
914 Bank of New Mexico Building,
Albuquerque, New Mexico.
Foster Wheeler Corporation; Ingersoll-Rand Company; I-T-E Circuit Breaker Company; Kuhlman Electric Company; Worthington Corporation.

William A. Sloan,
First National Bank Building East,
Albuquerque, New Mexico.
General Electric Company.

Donald C. McKinlay,
1700 Broadway,
Denver 2, Colorado.
General Electric Company.

Josiah C. Hoagland,
William C. McClearn,
Equitable Building,
Denver 2, Colorado.
I-T-E Circuit Breaker Company; Kuhlman Electric Company.

Joseph G. Hodges,
Denver Club Building,
Denver 2, Colorado.
McGraw-Edison Company; Moloney Electric Company; Wagner Electric Corporation.

Richard M. Davis,
818 17th Street,
Denver 2, Colorado.
Westinghouse Electric Corporation.

Ross L. Malone,
P. O. Drawer 700,
Roswell, New Mexico.
Westinghouse Electric Corporation.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	6
Appendix A	11
Appendix B	19
Appendix C	
Appendix D	

Table of Authorities

Cases:

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 5

Statutes:

Clayton Act, 15 U.S.C., § 15 2, 4
Clayton Act, 15 U.S.C., § 15b 3, 4, 5
Clayton Act, 15 U.S.C., § 16(b) 3, 4
28 U.S.C. § 1254 (1) 2
Sherman Act, 15 U.S.C., § 1 4

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PUBLIC SERVICE COMPANY OF NEW MEXICO, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners [1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in these actions on March 15, 1963.

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[1] Petitioners are the following twenty-four manufacturers of electrical and industrial equipment: Allen-Bradley Company; Allis-Chalmers Manufacturing Company; Carrier Corporation; C. H. Wheeler Manufacturing Company; Clark Controller Company; Cutler-Hammer, Inc.; Federal Pacific Electric Company; Foster Wheeler Corporation; General Electric Company; H. K. Porter Company; Ingersoll-Rand Company; I-T-E Circuit Breaker Company; Joslyn Manufacturing and Supply Company; Kuhlman Electric Company; McGraw-Edison Company; Moloney Electric Company; Ohio Brass Company, Inc.; Sangamo Electric Company; Southern States Equipment Corporation; Square D Company; The Porcelain Insulator Company; Wagner Electric Corporation; Westinghouse Electric Corporation; Worthington Corporation.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in C.C.H. 1963 Trade Cases, ¶ 70,716 and is attached as Appendix A to this petition. The opinion of the United States District Court for the District of New Mexico is unreported but is shown at pages 40 to 44 of the New Mexico record. The opinion of the United States District Court for the District of Colorado is reported in C.C.H. 1962 Trade Cases, ¶ 70,549 and is contained in the record at page 61 of "Appellants' Appendix A". The opinion of the United States District Court for the District of Utah is reported at 210 F.Supp. 574 (1962) and is contained in the record at page 73 of "Appellants' Appendix A".

Jurisdiction

The judgment of the Court of Appeals was entered on March 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Whether the running of the four year statute of limitations provided by Congress in Section 4B of the Clayton Act with respect to an action for damages brought under Section 4 of the Clayton Act may be tolled by "fraudulent concealment" of the cause of action.

Statutes Involved

Clayton Act, Section 4 (38 Stat. 731, 15 U.S.C. §15).

Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee."

Clayton Act, Section 4B (69 Stat. 283, 15 U.S.C. §15b).

Limitation of actions.

"Any action to enforce any cause of action under section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

Clayton Act, Section 5(b) (69 Stat. 283, 15 U.S.C. §16(b)).

Judgment in favor of Government as evidence; suspension of limitations.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; Provided however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder,

any action to enforce such cause of action shall be forever barred unless commenced within the period of suspension or within four years after the cause of action accrued."

Statement of the Case

This petition seeks review of a judgment of the Court of Appeals (annexed hereto as Appendix B), reversing orders of the district courts for the districts of New Mexico and Utah, and affirming a judgment of the district court for the district of Colorado with respect to the applicable period of limitation in all electrical equipment antitrust treble damage actions pending in these three districts. The judgment directly encompasses 38 cases pending in the District of Colorado, 28 cases in the District of New Mexico, and 13 cases in the District of Utah. In addition, 23 cases in the District of Kansas will be affected by the decision. The complaints in all of the actions involved claim treble damages under Section 4 of the Clayton Act, 15 U.S.C., Section 15, resulting from alleged conspiracies in violation of Section 1 of the Sherman Act, 15 U.S.C., Section 1, 26 Stat. 209 (1890). Each complaint alleges one or more causes of action for damages based on purchases of various kinds of electrical equipment during the period beginning, in some cases, at least as early as 1948. In order to support plaintiffs' claims in respect to periods of time outside the statutory period of limitation provided in Sections 4B and 5(b) of the Clayton Act, almost all of the complaints further allege that the defendants named therein fraudulently concealed from plaintiffs the existence of the alleged conspiracies.

The defendants in New Mexico and Colorado filed motions for partial summary judgment and the defendants in Utah filed motions for partial summary judgment and to strike

the allegations of fraudulent concealment. The contention in all three districts was that the four-year statute of limitations contained in Section 4B of the Clayton Act barred the collection of damages for transactions occurring prior to the limitations period.

The district courts in New Mexico and Utah granted the motions of the defendants, while the district court for the district of Colorado denied the motion of the defendants. The Court of Appeals for the Tenth Circuit reversed the New Mexico and Utah judgments and affirmed the Colorado order, holding that under circumstances of "fraudulent concealment" the limitation period would be tolled until the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered its cause of action.

Reasons for Granting the Writ

The Court of Appeals for the Tenth Circuit has misconstrued this Court's decision in *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), and has imposed a tolling provision not intended by congress to be applicable to Section 4B of the Clayton Act. Its erroneous judgment has opened up for litigation in the 79 electrical equipment cases to which it is directly applicable thousands of additional purchase transactions, thus multiplying by a presently undetermined amount this already enormous complex of litigation.

The issue decided by the Court of Appeals for the Tenth Circuit is the same issue which the Courts of Appeals for the Eighth and Second Circuits decided in similar electrical antitrust suits, which decisions are now the subject of Petitions for Writs of Certiorari pending before this Court. The reasons for granting a Writ of Certiorari in this instance are fundamentally the same reasons heretofore presented to this Court on pages 6 through 21 of the

Eighth Circuit Petition and on pages 8 through 22 of the Second Circuit Petition. Petitioners herein adopt all of those reasons by reference and attach copies of those petitions as Appendix C and Appendix D, respectively.

Conclusion

For the reasons set out above and in the Petitions for Writs of Certiorari to the United States Courts of Appeals for the Eighth and Second Circuits, this petition for certiorari should be granted.

Respectfully submitted,

JOHN F. SHAFROTH,
Equitable Building,
Denver 2, Colorado,
Joslyn Manufacturing and Supply Company; Southern States Equipment Corporation.

WINSTON S. HOWARD,
1900 First National Bank Building,
Denver 2, Colorado,
Allis-Chalmers Manufacturing Company; H. K. Porter Company, Inc.

JAMES T. PAULANTIS,
1220 Simms Building,
Albuquerque, New Mexico,
Carrier Corporation; Joslyn Manufacturing and Supply Company; Moloney Electric Company; Sangamo Electric Company; Southern States Equipment Corporation; Porcelain Insulator Company; Wagner Electric Corporation.

WILLIAM A. SLOAN,
WALDO SPIESS,
First National Bank Building, East,
Albuquerque, New Mexico,
Allen-Bradley Company; C. H. Wheeler Manufacturing Company; Clark Controller Company; Cutler-Hammer, Inc.; Ohio Brass Company, Inc.; Square D Company.

BENJAMIN F. STAPLETON,
1700 Broadway,
Denver 2, Colorado,
Federal Pacific Electric Company.

LUIS D. ROVIRA,
931 14th Street,
Denver 2, Colorado,
Foster-Wheeler Corporation; Worthington Corporation.

WILLIAM A. SLOAN, JR.
CHARLES C. SPANN,
914 Bank of New Mexico Building,
Albuquerque, New Mexico,
Foster Wheeler Corporation;
Ingersoll-Rand Company;
I-T-E Circuit Breaker Company;
Kuhlman Electric Company;
Worthington Corporation.

WILLIAM A. SLOAN,
First National Bank Building Downtown
Albuquerque, New Mexico,
General Electric Company.

DONALD C. MCKINLAY,
1700 Broadway,
Denver 2, Colorado,
General Electric Company.

JOSIAH C. HOLLAND,
WILLIAM C. MCCLEARN,
Equitable Building,
Denver 2, Colorado,
I-T-E Circuit Breaker Company;
Kuhlman Electric Company.

JOSEPH G. HODGES,
Denver Club Building,
Denver 2, Colorado,
McGraw-Edison Company
Moloney Electric Company
Wagner Electric Corporation

RICHARD M. DAVIS,
818 17th Street,
Denver 2, Colorado,
Westinghouse Electric Corporation

ROSS L. MALONE,
P. O. Drawer 700,
Roswell, New Mexico,
Westinghouse Electric Corporation

Of Counsel

GRANT, SHAFROTH, TOLL & MCHENDRIE,
Equitable Building,
Denver 2, Colorado.
Joslyn Manufacturing and Supply Company; Southern States Equipment Corporation.

DAWSON, NAGEL, SHERMAN & HOWARD,
1900 First National Bank Building,
Denver 2, Colorado.
Allis-Chalmers Manufacturing Company; H. K. Porter Company, Inc.

IDEN AND JOHNSON,
1220 Simms Building,
Albuquerque, New Mexico.
Carrier Corporation; Joslyn Manufacturing and Supply Company; Moloney Electric Company; Sangamo Electric Company; Southern States Equipment Corporation; Porcelain Insulator Company; Wagner Electric Corporation.

WALDO SPIESS,
First National Bank Building, East
Albuquerque, New Mexico.
Allen-Bradley Company; C. H. Wheeler Manufacturing Company; Clark Controller Company; Cutler-Hammer, Inc.; Ohio Brass Company, Inc.; Square D Company.

IRELAND, STAPLETON, PRYOR & HOLMES,
1700 Broadway,
Denver 2, Colorado.
Federal Pacific Electric Company.

AKOLT, TURNQUIST, SHEPHERD & DICK,
931 14th Street,
Denver 2, Colorado.
Foster Wheeler Corporation; Worthington Corporation.

HODGES, SILVERSTEIN, HODGES & HARRINGTON,
Denver Club Building,
Denver 2, Colorado.
McGraw-Edison Company; Moloney Electric Company; Wagner Electric Corporation.

FABIAN & CLENDENIN,
800 Continental Bank Building,
Salt Lake City, Utah.
General Electric Company.

GRANTHAM, SPANN & SANCHEZ,
914 Bank of New Mexico Building,
Albuquerque, New Mexico.
Foster Wheeler Corporation; Ingersoll-Rand Company; I-T-E Circuit Breaker Company; Kuhlman Electric Company; Worthington Corporation.

RODEY, DICKASON, SLOAN, AKIN & ROBB,
First National Bank Building Downtown
Albuquerque, New Mexico.
General Electric Company.

HOLME, ROBERTS, MORE & OWEN,
1700 Broadway,
Denver 2, Colorado.
General Electric Company.

HOLLAND AND HART,
Equitable Building,
Denver 2, Colorado,
McGraw-Edison Company;
Moloney Electric Company;
Wagner Electric Corporation.

LEWIS, GRANT AND DAVIS,
818 17th Street,
Denver 2, Colorado.
Westinghouse Electric Corporation.

ATWOOD AND MALONE,
P. O. Drawer 700,
Roswell, New Mexico.
Westinghouse Electric Corporation.

MODRALL, SEYMOUR, SPERLING, ROEHL & HARRIS,
Simms Building, P. O. Box 466,
Albuquerque, New Mexico.
Allis-Chalmers Manufacturing Company; H K Porter Company, Inc.; McGraw-Edison Company.

C. R. MCINTOSH,
51 Sena Plaza, P. O. Box 1019,
Santa Fe, New Mexico.
Federal Pacific Electric Company.

VAN COTT, BAGLEY, CORNWELL & MCCARTHY,
65 South Main Street,
Salt Lake City, Utah.
Allis-Chalmers Manufacturing Company.

PARSONS, BEHLE, EVANS & LATIMER,
1003 Kerns Building,
Salt Lake City, Utah.
Westinghouse Electric Corporation